UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

BRUNSWICK BAPTIST CHURCH, d/b/a HERITAGE BAPTIST CHURCH,	Case No. 03-13719 Chapter 11
Debtor.	

APPEARANCES:

DeGraff, Foy, Kunz & Devine, LLP *Attorneys for the Debtor* 90 State Street, Suite 1100 Albany, New York 12207	Amy F. Quandt, Esq.
Ehrlich, Hanft, Baird and Arcodia *Attorneys for Certain Unsecured Creditors* 64 Second Street Troy, New York 12180	Marc S. Ehrlich, Esq.
O'Connell and Aronowitz, P.C. *Of Counsel to Certain Unsecured Creditors* 54 State Street Albany, New York 12207-1885	Michael D. Assaf, Esq.
Martin, Harding & Mazzotti, LLP *Attorneys for Unsecured Creditor Ryan Pratt* P.O. Box 15141 Albany, New York 12212-5141	Rosemarie Riddell Bogdan, Esq.
Hodgson Russ LLP *Counsel to the Unsecured Creditors Committee and Special Counsel to Unsecured Creditor Ryan Pratt* 677 Broadway Albany, New York 12207	Richard L. Weisz, Esq.

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Presently before the court is a consolidated motion filed by Charles Borden, Diane Borden, Lewis E. McNamee, III, Susan D. McNamee, Rickey Vest, and Theresa Vest (collectively, the "Movants") seeking to enlarge the period in which to file proofs of claim in this case pursuant to Rules 3003(c)(3) and 9006(b)(1)

of the Federal Rules of Bankruptcy Procedure.[1] (*6/18/04 Affirmation of Marc S. Ehrlich, Esq.* (*"6/18/04 Ehrlich Affirmation"*), Doc. No. 61.) Objections to the motion were filed on June 30, 2004 by the debtor-in-possession, Brunswick Baptist Church (the "Debtor") (*6/30/04 Affirmation of Amy F. Quandt in Opp'n to the Mot.* (*"6/30/04 Quandt Affirmation"*), Doc. No. 71), and on July 21, 2004 by unsecured creditor Ryan Pratt ("Pratt") *(Resp. of Ryan Pratt in Opp'n to Movants' Application* (*"Pratt Resp."*), Doc. No. 82). The parties submitted memoranda of law in support of their respective positions. Oral argument on this and certain related motions was held on August 17, 2004, after which the court provided the parties an opportunity to submit additional memoranda of law; the Debtor and Pratt by September 3, 2004, and the Movants by September 20, 2004, the date on which the matter was submitted for decision.[2]

JURISDICTION

The court has core jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), (b)(2)(A), (B), and (O).

FACTS

The relevant facts are not in dispute. The Debtor, a not-for-profit religious organization, filed a bare-bones voluntary Chapter 11 petition under Title 11 of the United States Code ("Code") on May 29, 2003 (the "Petition"). According to the Petition, the Debtor's main assets consist of real property having net equity

[1] All further Rule references are to the Federal Rules of Bankruptcy Procedure.

[2] The court did not consider the matter, however, until November 15, 2004, the date on which other contested matters, including the Debtor's motion to approve a settlement with Pratt (*Decl. of Amy F. Quandt in Support of Application for Approval of Settlement*, Doc. No. 55) and the Movants' motion to terminate the automatic stay (*6/18/04 Aff. of Marc S. Ehrlich, Esq.,* Doc. No. 59), were submitted for decision.

of $318,500 (Schedules A, D),[3] and its interests in certain insurance policies.[4]

The Bordens are plaintiffs in a civil action filed against the Debtor, V.P. Building Corp., Bellevue Builders Supply, Inc., and Mitek Industries, Inc. in New York State Supreme Court, Rensselaer County, Index No. 208064, on April 24, 2003, therein seeking damages of $47,000,000. The McNamees are plaintiffs in a civil action filed against the Debtor in New York State Supreme Court, Rensselaer County, Index No. 203549, on November 7, 2001, therein seeking damages of $10,000,000.[5] The Vests are plaintiffs in a civil action filed against the Debtor, V.P. Building Corp., Bellevue Builders Supply, Inc., and Mitek Industries, Inc. in New York State Supreme Court, Rensselaer County, Index No. 208029, on April 20, 2003, therein seeking damages of $47,000,000. Pratt is a plaintiff in a civil action filed against the Debtor in New York State Supreme Court, Columbia County, Index No. 5033-02, on February 1, 2002, therein seeking damages of $8,000,000.[6] (*See* Debtor's Statement of Financial Affairs, Supplement to Question 4.a.) In their respective civil actions, the Movants individually aver that they sustained serious personal injuries on June 20, 2001 while working on the construction of a new church building on the Debtor's premises. In addition to the Movants, the Debtor has identified nine other potential claimants in connection with the June 2001

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[3] Schedule A lists a fee ownership interest in one parcel of real property located at 385 Grange Road, Troy, New York (the "Property"), valued at $435,000. The Property is subject to the $116,500 secured claim of Baptist Missions, Inc., whose lien arises from an August 2002 Mortgage on the Property.

[4] Under question 9 of Schedule B, the Debtor lists, *inter alia*, its interest in a single-occurrence liability policy issued by Church Mutual Insurance Company ("Church Mutual") that provided coverage for up to $1,000,000. The policy was cancelled by the insurer prior to the Debtor's bankruptcy filing, but Church Mutual remains liable for all occurrences that took place during its coverage period. (Schedule B, Supplement to No. 9.) The record reflects that the parties dispute whether the $1,000,000 insurance proceeds constitute property of the estate pursuant to Code § 541; the court continues to reserve its decision on that limited question.

[5] The full caption of the suit reveals that the Debtor filed a third-party complaint against V.P. Building Corp., Bellevue Builders Supply, Inc., Mitek Industries, Inc., Admar Supply Co., Inc., Skyjack Equipment, Inc., and Skyjack Manufacturing, Inc.

[6] The full caption of the suit reveals that the Debtor filed a third-party complaint against V.P. Building Corp., Bellevue Builders Supply, Inc., and Mitek Industries, Inc.

incident (*see* Schedule F),[7] but no other prepetition lawsuits were commenced against the Debtor. All claims arising out of the June 20, 2001 construction accident are marked on Schedule F as contingent and disputed.

The Movants were individually named on the List of Creditors that accompanied the Petition. The June 4, 2003 Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines (the "Bar Date Notice") issued by the United States Bankruptcy Court Clerk's Office listed the deadline for non-governmental creditors to file proofs of claim as September 29, 2003. (Doc. No. 2.) After expiration of the filing deadline, the Debtor's counsel, Amy F. Quandt, Esq., alerted the Clerk's Office that the Bar Date Notice had not been served on the creditor body. (*6/30/04 Quandt Affirmation* ¶ 15.) On November 14, 2003, pursuant to Rule 3003(c)(3), the court issued an Order Fixing Deadline to File Proofs of Claim as March 15, 2004 (the "Bar Date Order"). (Doc. No. 27.) On the same day, the Clerk's Office issued an Amended Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines (the "Amended Bar Date Notice") that listed the filing deadline for non-governmental creditors to file proofs of claim as March 15, 2004. (Doc. No. 24.) The Amended Bar Date Notice was the standard form customarily used in this District.[8] The Movants received the Amended Bar Date Notice at their personal residences, but they did not

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[7] The Debtor's Amended Schedule F corrects the misspelling of an originally scheduled claimant's last name from [David W.] "Novack" to "Novak," but it does not add any other claimants. Similarly, the Debtor's Second Amended Schedule F corrects the street address for Pratt, but it does not add any other claimants.

[8] As such, the Amended Bar Date Notice unambiguously stated:

> A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and *is not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, or you might not be paid any money on your claim against the debtor in the bankruptcy case.

Code § 1111 dispenses with the need for every creditor to file a proof of claim or interest in a Chapter 11 case by requiring only those creditors whose claims are listed on the debtor's schedules as disputed, contingent, or unliquidated to file a proof of claim. 11 U.S.C. § 1111(a). For the creditors' convenience, a pre-printed proof of claim form was attached to the Amended Bar Date Notice. The Movants do not dispute that they

forward the Amended Bar Date Notice to their counsel, O'Connell and Aronowitz, P.C. ("O & A"). (*7/6/04 Affirmation of Marc S. Ehrlich, Esq.* (*"7/6/04 Ehrlich Affirmation"*) ¶ 14, Doc. No. 77.)

On August 15, 2003, Pratt filed a general unsecured Proof of Claim in the amount of $8,000,000. (Claims Register, Claim No. 1.) On November 14, 2003, the Bankruptcy Noticing Center served the Bar Date Order on each of the Movants at his or her home address, and also on Pratt's counsel, Martin, Harding & Mazzotti, LLP ("MH & M").[9] (*See Certificate of Service*, Doc. No. 26.) The McNamees, Vests, and Bordens filed general unsecured Proofs of Claim on June 9, 2004 for unquantified amounts. (Claims Register, Claim Nos. 4, 5, 6). The only other claim in the case is the secured claim of Baptist Missions in the amount of $109,770, filed on January 9, 2004.[10] (Claims Register, Claim No. 3.)

Both here and in the state court actions, the McNamees are represented by O & A, the Bordens and Vests are represented by Caine and Proctor[11] and O & A, Pratt is represented by MH & M, and the Debtor, not Church Mutual,[12] is represented by DeGraff, Foy, Kunz & Devine, LLP ("DeGraff"). The Debtor did not

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were required to file proofs of claim in this case.

[9] By filing the Proof of Claim on Pratt's behalf, MH & M ensured receipt of all future notices in the case pursuant to Rule 2002(g), which states, "a proof of claim filed by a creditor . . . that designates a mailing address constitutes a filed request to mail notices to that address . . . ." FED.R.BANKR.P. 2002(g)(1)(A).

[10] On September 29, 2003, the Internal Revenue Service filed an unsecured priority claim in the amount of $8,777.37. (Claims Register, Claim No. 2.) By letter dated November 17, 2003, however, the IRS withdrew its claim. (Doc. No. 31.)

[11] Caine & Proctor (Derek Proctor, Esq.) has offices in Moulton, Alabama, the hometown of the Bordens and Vests, and was originally retained by them in connection with their personal injury suits against the Debtor. Caine & Proctor in turn contacted O & A to serve as New York counsel to the Bordens and Vests. (*11/15/04 Aff. of Charles and Diane Borden* ¶¶ 3–4, Doc. No. 116; *11/15/04 Aff. of Rickey and Theresa Vest* ¶¶ 3–4, Doc. No. 116.)

[12] On numerous occasions, O & A has mistakenly alleged that counsel for the Debtor and Church Mutual are one and the same. However, DeGraff has confirmed that it represents the Debtor only and that Church Mutual is not its client. Pursuant to the Debtor's liability insurance policy with Church Mutual, Church Mutual has agreed to pay DeGraff's fees in connection with its representation of the insured. (*6/30/04 Quandt Affirmation* ¶ 28.) Those fees, of course, must be approved by this court pursuant to Code § 330 and Local Bankruptcy Rule 2016-1.

list Caine & Proctor, O & A, or MH & M for notice purposes on either Schedule F or its List of Creditors. During the state court litigation, DeGraff did, however, notify O & A both verbally and in writing that the Debtor intended to file for Chapter 11 protection. (*7/18/04 Aff. of Andrew Safranko* (*"Safranko Aff."*) ¶ 9, Doc. No. 61.) Moreover, O & A received actual notice of the filing on or about July 11, 2003. (*Id.* ¶ 18.) By notice dated August 15, 2003, Pratt and the McNamees were appointed by the United States Trustee to the committee of unsecured creditors. The notice of appointment was filed with the Court Clerk's Office on August 18, 2003, together with a Certificate of Service indicating that both O & A and MH & M had been served with the notice on behalf of their respective clients. (*See 6/30/04 Quandt Affirmation*, Ex. D.)

O & A did not file a notice of appearance in this case on behalf of the McNamees, Vests, or Bordens until June 30, 2004. (Doc. Nos. 66, 67, 68.) Notwithstanding, prior to expiration of the bar date, DeGraff served O & A with substantive pleadings, including the Application to Extend Debtor's Exclusive Period to File Plan (the "First Application") (Doc. No. 19) (*See 6/30/04 Quandt Affirmation*, Ex. E), the Second Application to Extend Debtor's Exclusive Period to File Plan (the "Second Application") (Doc. No. 35) (*See 6/30/04 Quandt Affirmation*, Exs. F, G), and the Notice of Motion for Approval of First Application for Allowance of Interim Compensation by Attorneys for Debtor (Doc. No. 29) (*See 6/30/04 Quandt Affirmation*, Ex. J). Ten days after the bar date expired, DeGraff served O & A with the Third Application to Extend Debtor's Exclusive Period to File Plan (the "Third Application") (Doc. No. 41) (*See 6/30/04 Quandt Affirmation*, Ex. H). The Debtor included the following language in the Second Application: "Though debtor commenced its Chapter 11 case on May 29, 2003, Notice of the Commencement of the Bankruptcy Case was not issued until November 2003. As a result, the deadline for filing proofs of claim has been extended to March 15, 2004." (Second Application ¶ 4.) The Debtor included virtually identical language in the Third Application: "Though debtor commenced its Chapter 11 case on May 29, 2003, Notice of the Commencement of the Bankruptcy Case was not issued until November 2003. As a result, the deadline for filing proofs of claim was extended to March 15, 2004." (Third Application ¶ 4.)

After the extended bar date expired on March 15, 2004, attorney Quandt confirmed by reference to

the official Claims Register that Pratt was the only litigant to have filed a Proof of Claim. (*6/30/04 Quandt Affirmation* ¶ 18.) At that time, she began settlement discussions with MH & M. (*Id.* ¶ 19.) In order to comply with the court's April 26, 2004 Order granting the Debtor's Third Application, the Debtor had to file its plan of reorganization on or before May 27, 2004. (*See Order Extending the Debtor's Exclusivity Period*, Doc. No. 44.) After reaching a settlement agreement with Pratt whereby Church Mutual would pay $450,000 to Pratt on behalf of the Debtor in exchange for Pratt's release to the Debtor and Church Mutual of all rights and claims relating to the June 20, 2001 incident (the "Pratt Settlement"), the Debtor incorporated the terms of the same into the Debtor's Chapter 11 Plan of Reorganization ("Plan") (Doc. No. 46) and Disclosure Statement (Doc. No. 47) filed March 27, 2004. (*6/30/04 Quandt Affirmation* ¶ 21.) Because the Movants had not filed proofs of claim as of that date, Article IV of the Plan proposes a voluntary, nominal distribution of $3,000 to the Movants' class; under this distribution scheme, the McNamees, Vests, and Bordens will receive gratuitous recompense of $1,000 per couple for their respective lawsuits. (Plan at 7.)

ARGUMENTS

The Movants assert two grounds upon which their claims should be allowed. First, they claim that they were given inadequate notice of the proof of claim deadline. *See In re The Grand Union Co.*, 204 B.R. 864, 870 (Bankr. D. Del. 1997) ("inadequate notice of the bar date, in and of itself, is a separate ground upon which a late proof of claim is allowed to be filed"); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (inadequate notice of the claims bar date is a defect which precludes discharge of a claim in bankruptcy). Second, they ask the court to allow their claims on the basis of excusable neglect. *See* FED.R.BANKR.P. 9006(b)(1) (in certain instances, when an act is required or allowed to be done at or within a specified time period, the court may "permit the act to be done where the failure to act was the result of excusable neglect"); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) ("Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.").

Under the first theory of inadequate notice, the Movants preliminarily challenge the validity of the Amended Bar Date Notice because it was signed by the Clerk of the court under an Administrative Order delegating to the Clerk the power to fix bar dates without notice and a hearing. (*7/30/04 Supplemental Affirmation of Michael D. Assaf, Esq.* ¶ 7, Doc. No. 85.) They contend this procedure does not comply with Rule 3003(c), which requires the court to "fix" the bar date in Chapter 11 cases.

The Movants' main arguments, however, largely mirror those made by the personal injury claimants in *Grand Union*. There, Judge Walsh held, *inter alia*, that Grand Union had a duty to include the names and addresses of the claimants' attorneys in conjunction with the identity of the claimants listed in the schedules, 204 B.R. at 888, and that Grand Union's direct mailing of the bar date notice to the personal injury claimants rather than to their known counsel did not satisfy the due process requirement of adequate notice, *id*. at 872. Adopting the language and reasoning of Judge Walsh, the Movants contend because DeGraff had specific knowledge of O & A's representation and had dealt exclusively with O & A in the prior litigation, the Debtor had a duty to (1) list O & A on the mailing matrix to ensure that O & A would be served with the Bar Date Order and Amended Bar Date Notice pursuant to Rule 2002(g)[13] (*7/6/04 Ehrlich Affirmation* ¶ 9) and (2) actually furnish O & A with the Amended Bar Date Notice prior to March 15, 2004 (*6/18/04 Ehrlich Affirmation* ¶ 13). The Movants further aver that the court must follow the *Grand Union* rationale and read the relevant bankruptcy rules in conjunction with state ethical rules, "thereby requiring the debtor in cases such as this to deal directly with counsel when counsel is known to the debtor" (*Movants' Mem. of Law* at

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[13] This Rule provides in relevant part:

> (1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision –
>
> (A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address . . .
>
> (2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later.

FED.R.BANKR.P. 2002(g).

2-11, Doc. No. 83). Here, the Movants suggest that the Debtor's failure to do so was a deliberate, calculated attempt to "freeze out" the Movants from the bankruptcy case and thereby protect the estate's non-exempt assets to ensure the vitality and longevity of the Debtor.

The parties agree that the second inquiry of excusable neglect is governed exclusively by the equitable test fashioned by the United States Supreme Court in *Pioneer.* Analyzing the *Pioneer* factors,[14] the Movants argue that the equities tip in their favor because: (1) the danger of prejudice to the Debtor is minimal since the Debtor knew about the Movants' claims as early as June 2001 and should, therefore, be charged with an expectation that the claims would be filed (*id*. at 20); (2) the length of any delay and the impact on the case caused by the allowance of the Movants' claims will be insignificant since the Plan and Disclosure Statement were recently filed and no distribution has been made by the estate (*id.* at 21); (3) the reason for the delay was the Movants' belief that O & A received a copy of the Amended Bar Date Notice, but counsel was unaware that the bar date had been set (*id.* at 23); and (4) the Movants did not act in bad faith.

The Debtor's position is simple: the core issue is one of neglect, not notice, and the Movants have failed to demonstrate that their neglect was excusable under *Pioneer*. On the narrower question of adequate notice, the Debtor urges the court to reject *Grand Union* in favor of the more restrictive and acclaimed approach taken by Chief Judge Lifland in *In re R.H. Macy & Co., Inc.*, 161 B.R. 355, 360 (S.D.N.Y. 1993) (known creditors are entitled to actual notice of the bar date and the debtor is obligated to send all notices directly to the creditor unless the creditor's agent affirmatively directs otherwise). The Debtor argues that the Movants and O & A perilously "ignored the notices and deadlines imposed by this Court for an entire year while Debtor's Chapter 11 bankruptcy case progressed through the process of reorganization." (*Debtor's Mem. of Law in Opp'n* at 5, Doc. No. 72.) To that end, the Debtor asserts the Movants' claims must be

[14] Whether a party's neglect may be excusable is an equitable determination, in which the court must weigh the relevant circumstances surrounding the party's omission. These include "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395.

disallowed. The Debtor characterizes their neglect as "inexcusable indifference," and suggests that their inadequate notice stance "further evidences the absence of a genuine excuse" for the same. (*Id.*) In joining with the Debtor, Pratt submits because the Movants and O & A had actual notice of the bar date and failed to timely file proofs of claim, their inability to participate in the bankruptcy case is a "self-inflicted injury" which does not justify the relief requested. (*Pratt Resp.* at 2.)

Specifically addressing the *Pioneer* factors, the Debtor contends that: (1) the potential prejudice to the Debtor is great because the allowance of the Movants' claims could force the Debtor to dissolve (*Debtor's Supplemental Memo. of Law in Opp'n* at 6, Doc. No. 99); (2) allowance of the late claims will halt the Debtor's progress and unravel its efforts thus far, causing the court to "become buried by the task of determining the value of the claims," and potentially force the Debtor's conversion to Chapter 7 (*id.* at 9-10); (3) the ability of O & A to review the documents served upon counsel, and thereby timely file proofs of claim, was well within counsel's control (*id.* at 10); and (4) their lack of "genuine grounds for a finding of excusable neglect, and their groundless insinuations and accusations against the Debtor and its agents do not exemplify a good faith request for this Court's empathy and exercise of its equitable powers" (*id*. at 11).

DISCUSSION

The stakes in this contest are high for both sides, and while the parties have expended considerable time on both issues of adequate notice and excusable neglect, the court finds the latter issue to be decisive under the circumstances presented. Notwithstanding, the court will first analyze the Movants' arguments concerning the adequacy of the notice provided before determining whether the Movants can file late proofs of claim on the basis of excusable neglect.

I. Adequacy of Notice

While the court appreciates counsel's zealous representation, it easily dispenses with the Movants' contention that the Amended Bar Date Notice is invalid on its face because it bear's the Clerk's signature in

lieu of the undersigned's.[15] Neither the Code nor the Rules require that bankruptcy judges personally sign every order issued in the context of a bankruptcy case and judges routinely delegate the ministerial task of signing non-judicial orders, or those that do not involve the signatory's independent judgment or discretion as to the substance of the order. This is true of the Bar Date Order; excepting so-called "fast track" cases or other unusual circumstances, the bar date is routinely set ninety days from the commencement of the case. The Bar Date Order is certain, simple, and straightforward; once the court reviewed and approved its general form, it was properly directed to the Clerk for his signature and service upon creditors.

Because the Movants' other procedural arguments originate in the conclusions and dicta of *Grand Union,* the court limits its discussion to the reasons it respectfully declines to follow that case. Preliminarily, the court notes that the factual differences between *Grand Union* and the case *sub judice* are too numerous to recite, and they add little to the court's analysis. Rather, the court's interest lies in the legal conclusions and reasoning of Judge Walsh, who appears to have taken great liberties to reach a morally sound ruling in favor of the aggrieved claimants in that case.

For example, Judge Walsh determined since the claimants were unsophisticated and could have easily believed that the bar date notice would have been sent to and received by their counsel, they were "entitled to pay little or no attention to the bar date notice sent to them by Grand Union." *Grand Union Co.*, 204 B.R. at 872. Judge Walsh rejected the Grand Union's Rule 2002(g) argument that it had no official duty to communicate directly with the claimants' attorneys because none had filed notices of appearance in the case, stating only:

> I believe the 'in a filed request' language of Rule 2002(g) should be broadly construed to encompass the present situation, in which an attorney representing a personal injury claimant, in a pre-petition written notice, has requested Grand Union or, its claims adjuster, to communicate with the attorney exclusively regarding the claim. I do not believe Rule 2002(g) should be construed so narrowly as to impose on the debtor a duty to send the bar date notice to the movants' counsel only if counsel files a formal request in the bankruptcy

[15] While the Movants specifically question the Amended Bar Date Notice, the court assumes that their attention is directed to the Bar Date Order, which actually fixed the bar date in this case. That too bears the signature of the Clerk.

estate.

Id. at 874.

> I believe that Rule 2002(g) . . . should be interpreted in accordance with the prevailing ethical standards that require dealings with counsel where an opposing party is known to be represented. Accordingly, Rule 2002(g) should not be construed so as to allow a Chapter 11 debtor to send its bar date notice to a personal injury claimant if the claimant's legal representation is known to the debtor.

Id. at 878 (internal quotation marks and citation omitted). In formulating this opinion, the bankruptcy court looked to *In re Williams*, 51 B.R. 627, 629 (Bankr. S.D. Ohio 1985), citing the same for the proposition that a debtor must include in its schedules and list of creditors the name and address of known counsel for a creditor for the purpose of notifying that creditor. *Grand Union Co.*, 204 B.R. at 877-78. While the bankruptcy court recognized contrary decisional law, *see In re Solvation, Inc.*, 48 B.R. 670, 674 (Bankr. D. Mass. 1985) (court cannot exercise its equitable power and extend the filing date for claims on grounds that a creditor has received notice but its attorney has not); *Dependendable Ins. Co. v. Horton (In re Horton)*, 149 B.R. 49, 59 (Bankr. S.D.N.Y. 1992) (noting there is no requirement to serve creditor's counsel, even if known, with notice of the bankruptcy proceedings); *Midatlantic Nat'l Bank v. Kouterick (In re Kouterick)*, 161 B.R. 755, 759 (Bankr. D.N.J. 1993) (while it is a "desirable courtesy" to list an attorney who is known to have represented a creditor in prepetition matters regarding the debt in question, there is no legal obligation to do so), it declined to follow the majority "for a simple reason: the claimants [in *Grand Union*], unlike those in *Solvation, Horten* and *Kouterick*, [were] not sophisticated creditors who should have known about the consequences of the bankruptcy proceeding and a bar date notice." *Grand Union Co.*, 204 B.R. at 880.

This court, in line with the majority, strongly disagrees with such an arbitrary distinction and loose interpretation of Rule 2002(g), irrespective of how well-intentioned it may have been. *See, e.g., In re R.H. Macy & Co., Inc.*, 1993 WL 195408, No. 92 B 40477, at *1 (Bankr. S.D.N.Y. May 12, 1993) (it was not improper for the debtor to have mailed the notice of claim to the creditor rather than to her attorney), *rev'd on other grounds,* 166 B.R. 799 (S.D.N.Y. 1994); *see also In re Agway, Inc.*, 313 B.R. 22, 30 (Bankr. N.D.N.Y. 2003) (creditor counsel's reliance on debtor's counsel to keep him apprised of the case instead of

filing a notice of appearance was inexcusable). Moreover, the court finds that *Grand Union* has little, if any, application to the case at hand. *See Jones v. Chemetron Corp.,* 212 F.3d 199, 209 (3d Cir. 2000) (citing case for the proposition that the plaintiffs' degree of sophistication is relevant to the adequacy of the notice of bankruptcy proceedings they received); *Second Chance Body Armor, Inc. v. Am. Body Armor & Equip.*, 1999 WL 608718, No. 94 C 6178, at *4 (N.D. Ill. Aug. 6, 1999) (citing case for due process principle that adequate notice is a prerequisite to discharge of a creditor's claim in bankruptcy); *In re Lomas Fin. Corp.*, 212 B.R. 46, 54 (Bankr. D. Del. 1997) (Judge Walsh referencing the court's earlier decision for a "detailed discussion of the applicability of [a certain] case to a related notice to counsel issue in a bankruptcy context"); *In re Feldman*, 261 B.R. 568, 577 (Bankr. E.D.N.Y. 2001) (citing case for the proposition that published notice of a claims bar date is inadequate for known creditors); *In re Brunswick Hosp. Ctr., Inc.*, 1997 WL 836684, Nos. 892-80487-20, 894-8283-346, at *3 (same); *In re Twins, Inc.*, 295 B.R. 568, 571 (Bankr. D.S.C. 2003) (citing case for the proposition that "[w]hether a creditor received adequate notice of a claims bar date in a chapter 11 case depends upon the facts and circumstances of a given case").

Grand Union makes no reference to core bankruptcy principles that influence and guide this court. A chief purpose of bankruptcy law is to secure the prompt administration and settlement of the debtor's estate. *Katchen v. Landy,* 382 U.S. 323, 328 (1966). In furtherance of this objective, Rule 3003(c)(3) provides the court shall "fix and for cause shown may extend the time with which proofs of claim or interest may be filed." FED.R.BANKR.P. 3003(c)(3). "Congress intended the bar date in a Chapter 11 case to be a mechanism for providing the debtor and creditors with finality." *Maxwell Macmillan Realization Liquidating Trust & MCC Gao, Inc. v. Aboff* (*In re Macmillan, Inc.*), 186 B.R. 35, 48 (Bankr. S.D.N.Y. 1995) (citing cases). Thus, the bar date order "is critically important to the administration of [a] chapter 11 case, and the reorganization process." *In re Jamesway Corp.*, 1997 WL 327105, Nos. 95 B 44821, 96/8389A, at *9 (Bankr. S.D.N.Y. Jun. 12, 1997). "A bar order serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization."

First Fidelity Bank, N.A. v. Hooker Invs., Inc. (*In re Hooker Invs., Inc.*), 937 F.2d 833, 840 (2d Cir. 1991) (citing cases); *see also Macmillan*, 186 B.R. at 48 (citing *Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.),* 89 B.R. 358, 374 (Bankr. S.D.N.Y. 1988), *aff'd*, 99 B.R. 543 (S.D.N.Y. 1989), *aff'd*, 896 F.2d 1384 (2d Cir. 1990); *Associated Container Transp. (Australia) Ltd. v. Black & Geddes, Inc. (In re Black & Geddes, Inc.)*, 58 B.R. 547, 553-54 (S.D.N.Y. 1983)). The bar date order does not function as a "mere procedural gauntlet," *In re Hooker Invs., Inc.*, 937 F.2d at 840, but rather serves as a statute of limitations which must be strictly observed, *Macmillan,* 186 B.R. at 49; *accord In re Keene Corp.*, 188 B.R. 903, 907 (Bankr. S.D.N.Y. 1995). Judicial conscience, therefore, cannot justify circumvention of the bar date even in the most horrific cases.

Here, several factors confirm that the Movants were given adequate notice of the bar date. First, the court finds the Debtor complied with Rule 1007[16] and Local Bankruptcy Rule 1007-2[17] by listing the names and addresses of the individual Movants on its mailing matrix. Second, the court does not read the language of Rule 2002(g) or that of New York Disciplinary Rule 7-104 entitled "Communication with Represented and Unrepresented Parties" to require service on counsel rather than on the individual creditor. The court finds no merit in the Movants' assertion that the disciplinary rules somehow override the applicable bankruptcy rules. The anti-contact provision of DR 7-104 prohibits a retained lawyer from communicating directly "on the subject of the representation" with a party whom the lawyer knows to be represented "in that matter."

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[16] Rule 1007 requires a voluntary Chapter 11 debtor to file with the petition "a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities," FED.R.BANKR.P. 1007(a)(1), and "a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims . . . ," FED.R.BANKR.P. 1007(d).

[17] Local Bankruptcy Rule 1007-2 provides in relevant part:

> (a) Matrix. Any list of creditors, schedule of liabilities . . . required to be filed pursuant to FRBP 1007 shall be accompanied by a matrix containing the name and address of the United States trustee and all creditors and other parties in interest. . . .
>
> (b) Matrix of Twenty Largest Unsecured Creditors. The list of the twenty largest unsecured creditors filed pursuant to FRBP 1007(d) shall be accompanied by a separate matrix, in proper form, as set forth in subsection (a) above, listing only those unsecured creditors.

DR 7-104; N.Y.C.R.R. § 1200.35. Accepting the Movants' logic, the Debtor would only have been able to list for notice purposes the Movants' counsel, O & A, in direct violation of Rule 1007 and Local Bankruptcy Rule 1007-2. Moreover, the bankruptcy case and proceedings are separate and distinct from the state court litigation and it is not always a safe assumption that state court counsel and bankruptcy counsel are one and the same. Finally, even if the court were to find that the Debtor was required to serve O & A, any argument with respect to adequate notice would be immediately stricken since O & A had actual knowledge of the Debtor's impending bankruptcy filing as early as May 2003, approximately ten months prior to expiration of the bar date. Moreover, even if counsel ignored the initial warning, O & A was given numerous reminders that the bar date had been set.

The court sympathizes with the Movants' plight, but it rejects their due process challenge to the notice of the bar date; it was not inadequate notice that caused their failure to comply with the filing deadline.[18]

II. Excusable Neglect

The pertinent inquiry is whether the Movant's have demonstrated that their failure to file timely claims was due to excusable neglect. *See Agway*, 313 B.R. at 44 ("The burden of proving the existence of excusable neglect rests with the movant.") (citing *In re XO Communications, Inc.*, 301 B.R. 782, 795 (Bankr. S.D.N.Y. 2003)). "The bankruptcy court has wide discretion to allow or disallow the late filing of proofs of claim." *Royal Ins. Co. of Am. v. McCrory Corp.*, 1996 WL 204482, No. 94 Civ. 5734, at *1 (S.D.N.Y. Apr. 25, 1996); *accord In re D.A. Elia Constr. Corp.*, 2001 WL 210497, Nos. 00-CV-0254E, 00-CV-0255E, 00-CV-0256E, at *2 (W.D.N.Y. Feb. 16, 2001) (Supreme Court adopted a broad interpretation of the excusable

[18] The issue of notice requires one final point of clarification. The Movants' are under the mistaken assumption that DeGraff gave preferential treatment to MH & M. The Clerk's Office – not the Debtor – served MH & M directly with the Amended Bar Date Notice pursuant to Rule 2002(g). *See supra* p. 5 and n. 9. By the time the Amended Bar Date Notice was mailed, MH & M had preemptively filed a Proof of Claim on behalf of Pratt, but O & A had not yet filed claims on behalf of the Movants. If O & A had taken the same initiative in filing the Movant's claims immediately upon notice of commencement of the case, it also would have been added to the mailing matrix by the Clerk's Office.

neglect standard). The court notes, however, that "[c]ourts generally do not rule in favor of claimants . . . who have neglected to timely file proofs of claim as a result of their failure to communicate with counsel regarding a legal notice or their own or their counsel's disregard of the relevant substantive law governing their claim." *Agway*, 313 B.R. at 44 (citing cases).

A. The Pioneer factors

Regarding the application of the *Pioneer* factors, each one need "not be unmet in order to find no excusable neglect." *In re Agway, Inc.*, 313 B.R. at 27 (quoting *In re O.W. Hubbell & Sons, Inc.*, 180 B.R. 31, 36 (N.D.N.Y. 1995), *aff'g* No. 90-02053 (Bankr. N.D.N.Y. Sept. 22, 1994)); *see also Keene Corp.*, 188 B.R. at 909 ("an approach that considers all the relevant factors, but recognizes that they all need not point in the same direction, is the correct one").

1. Prejudice to the Debtor

The Supreme Court did not define "prejudice" in *Pioneer*, but subsequent cases have identified a number of relevant considerations, including "the size of the late claim in relation to the estate, whether a disclosure statement or plan has been filed or confirmed with knowledge of the existence of the claim, the disruptive effect that the late filing would have on a plan close to completion or upon the economic model upon which the plan was formulated or negotiated." *Keene Corp.*, 188 B.R. at 910 (citing cases). Here, two of the three factors militate strongly against the relief sought by the Movants. Unlike other cases where a "certain amount of crystal ball gazing" is required "to predict the adverse effect of a late claim on the debtor and on the administration of the case," *id*. at 912, the court is certain that the Debtor in this case would be unduly prejudiced if the Movants' late claims were allowed.

The Movants' claims are substantial and O & A concedes that allowance of the claims would require the Debtor to liquidate its main asset, the Property, because it would not have sufficient income or income-generating capability to fund a feasible plan of reorganization under those circumstances. (*Movants' Mem. of Law* at 20, 22.) Liquidation would leave the congregation without a physical, central place of worship. As a potential means of mitigating such prejudice, the Movants suggest that the congregation "simply . . . rent

a meeting hall or, perhaps, . . . meet in the homes of members of the congregation until a new meeting place is secured." (*Movants' Supplemental Mem. of Law* at 16, Doc. No. 104.) Even if this could be done, the Movants fail to appreciate that both the Debtor and Pratt relied, at least in part, upon their neglect in negotiating the Pratt Settlement. More importantly, the Debtor relied exclusively upon the Pratt Settlement in formulating the Plan.

The court rejects the Movants' argument that their claims should be allowed because the Debtor should be charged with an expectation that the claims would be filed. In fact, the opposite proposition is supported by the number of times the Debtor cautioned the Movants or their counsel about the bankruptcy filing or, more specifically, the bar date: when the Movants repeatedly failed to respond, the Debtor had reason to believe that they had chosen to elect other remedies, including pursuing their state court claims against the presumably solvent, third-party defendants.

To allow the Movants to file late claims would not only hinder the progress the Debtor has made in crafting its Plan and Disclosure Statement, but would doom the Plan altogether. The Movants indirectly address this point, stating that the insurance proceeds should be apportioned based on the seriousness of the claimant's injuries, and that Pratt, therefore, should receive the smallest share. The appropriate forum for liquidating personal injury claims, however, is the state court; had the Movants timely filed claims in this case, the Debtor would have been forced to reach a global settlement, or none at all. The Movants are now seeking a second bite at the proverbial apple, to which they are not entitled, to in effect undo the Pratt Settlement.

Perhaps recognizing the unlikely success of the foregoing position, they also aver that the Debtor will be unjustly enriched and receive a windfall if it is permitted to retain approximately one-half of the insurance proceeds. (*Id.* at 21.) For reasons more appropriately discussed in the context of the Movant's pending motion to lift the automatic stay, their belief that the Plan will insulate the remaining portion of the insurance proceeds is mistaken. *See, e.g., Royal Ins. Co. of Am.*, 1996 WL 204482, at *2 (a civil action may be filed independently of a proof of claim where the plaintiff sues the debtor only to establish liability against a third

party if the proposed action will not burden the estate or prejudice other creditors).

2. Length of delay

The length of delay in this case is 185 days. Not surprisingly, the Movants consider the length of their delay to be insignificant, though it persisted for several months. The court disagrees. The first lawsuit was filed by the McNamees against the Debtor in November 2001; thus, for approximately eighteen months prior to the bankruptcy filing, the Debtor's fate was uncertain since a successful verdict by any of the Movants respectfully, including the McNamees, could have financially ruined the Debtor. When defense of the civil litigation seemed likely to fail, the Debtor sought Chapter 11 relief from this court. The Debtor's counsel waited for the bar date to pass, then negotiated and reached the Pratt Settlement with the only claimant to have timely filed a claim in the case. The Debtor filed its Plan and Disclosure Statement before the Movants' filed their claims, and its motion to approve the Pratt Settlement only six days after the claims were filed. Pivotal events, therefore, happened in the case during the Movants' 185 day delay.

3. Reason for delay

As in most Chapter 11 cases, the Amended Bar Date Notice in this case was clear and unambiguous. The Clerk's office served the Amended Bar Date Notice and the Movants received it, but they did not file timely claims due to lack of communication with counsel. To make matters worse, O & A, despite contentions to the contrary, had notice of the bar date prior to its expiration, but counsel nonetheless let the bar date lapse without filing the Movants' claims. Under the circumstances, the Movants cannot argue that the delay was not within their reasonable control.

4. Good faith

The Movants' good faith, or the Debtor's for that matter, did not become a hot-button issue until the late stages of this dispute. While personal attacks fueled by lawyering tactics have been waged by counsel against one another, the Movants' good faith has not been disputed by the Debtor, and, accordingly, the court has no reason to assume otherwise.

CONCLUSION

The Supreme Court recognized the bankruptcy court's role in Chapter 11 cases to "balance the interests of the affected parties" while being guided by "the overriding goal of ensuring the success of the reorganization." *Pioneer*, 507 U.S. at 389. Unfortunately, the court cannot always harmoniously achieve "the aim of rehabilitating the debtor and avoiding forfeitures by creditors." *Id.* (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983)). In this case, the synergy of factors discussed *supra* prevents the court from making the Movants whole; all factors weigh in the Debtor's favor, and, accordingly, the Movants' motion is denied.

IT IS SO ORDERED.

Dated: July 29, 2005
Albany, New York

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Court Judge